



REPUBLIC OF KENYA



**Aketch v Munga & 4 others (Environment & Land Case 107 of 2016)
[2023] KEELC 21000 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21000 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 107 OF 2016
NA MATHEKA, J
OCTOBER 24, 2023**

BETWEEN

LEAH MORINE AKETCH PLAINTIFF

AND

SALIM CHICCO MUNGA 1ST DEFENDANT

SALIM MC' MAZRUI CHICCO 2ND DEFENDANT

CHICCO MAZRUI KISASA 3RD DEFENDANT

ESHA MC' MAZRUI CHICCO 4TH DEFENDANT

ESTATE OF HASTINGS MAZRUI 5TH DEFENDANT

RULING

1. The application is dated 17th May 2023 and is brought under Order 8 Rules 3 and 5, Order 51 Rule 1 of the *Civil Procedure Rules*, Article 159 Of *Constitution of Kenya* 2010 seeking the following orders;
 1. That this Honourable Court be pleased to grant leave to the Plaintiff to amend her Plaintiff in the manner shown in the proposed amended Plaintiff annexed to the Affidavit in support of the application.
 2. That costs of this application be costs in the cause.
2. It is supported by the Affidavit sworn by Leah Morine Aketch and grounds that in the Plaintiff's witness Statement dated 10th December 2015 the Plaintiff confirms having paid to the Defendants the aggregate sum of Kshs.8, 901,428 and suffered loss in her business amounting to Kshs.4,393,503/-. That Plaintiff is desirous of including an alternative prayer in the plaintiff for a refund of Kshs.13,294,931/-. That it is in the interest of justice to allow the application.



3. The 1st Defendant states that in determining such an application, this Court has to consider whether the information the Plaintiff seeks to introduce was available to her at the time she filed the plaint and that the amendment shall not occasion any prejudice to the defendants that cannot be compensated by way of costs. That Plaintiff filed this suit on 2013. The Plaintiff has amended the suit twice. The matter has started de novo thrice. That other than mere inadvertence, the Plaintiff has not substantiated the reason for the not effecting the intended changes from the last 10 years since filing the suit. That that the intended amendment is in reaction to cross examination of the Plaintiff on the hearing date and only seeks to fill holes made during the said cross examination. That the intended amendment at this stage will definitely prejudice the Defendants because it is only made in reaction to cross examination of the Plaintiff.
4. This court has considered the application and the submissions therein. Order 8 Rule 3 of the [Civil Procedure Rules](#) provides for amendment of pleadings with leave of court as follows: -
 - (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
5. Further, Order 8, rule 5 gives the court the general power to amend.
 - 5.(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
6. The Respondent strongly opposed the application and pointed out that Plaintiff filed this suit on 2013. The Plaintiff has amended the suit twice. The matter has started de novo thrice. That other than mere inadvertence, the Plaintiff has not substantiated the reason for the not effecting the intended changes from the last 10 years since filing the suit. That that the intended amendment is in reaction to cross examination of the Plaintiff on the hearing date and only seeks to fill holes made during the said cross examination.
7. Be that as it may, Section 1A of the [Civil Procedure Act](#) provides for the overriding objective of the [Civil Procedure Act](#) and the rules made thereunder and provides as follows:
 - 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the [Act](#).
 - (2) The Court shall, in the exercise of its powers under this [Act](#) or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
8. Section 1B of the same [Act](#), on the other hand provides for the duty of court and states:
 - (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;



- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.

9. The proposed amendment the Plaintiff seeks to include an alternative prayer in the Plaintiff for a refund of Kshs.13,294,931/-. It does not introduce any new cause of action if at all. In my view I am convinced that in the interest of justice and the stage of this suit that no prejudice would be suffered by the Defendants if the further further amended Plaintiff is allowed.

10. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others*, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

11. On the issue of amendment of pleadings in the case of *AAT Holdings Limited vs Diamond Shields International Ltd* (2014) eKLR, the court cited the principles as set out by the Court of Appeal in *Central Kenya Ltd Case No. 222 of 1998* as shown below;

- (i) That are necessary for determining the real question in controversy.
- (ii) To avoid multiplicity of suits provided there has been no undue delay.
- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- (iv) That no vested interest or accrued legal rights is affected; and
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

12. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. In the case of *Isaac Awuondo vs Surgipharm Ltd & Another* (2011) eKLR the Court of Appeal had the following to say:

In *Moi University vs Vishva Builders Limited* - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *H.D Hasmani v. Banque Du Congo Belge* (1938) 5 EACA 89. We must however hasten to add that a triable issue does not mean one that will



succeed. Indeed, in *Patel vs. E.A. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan , J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”

13. I have also perused the proposed Further Further Amended Plaintiff and I see that no prejudice will be suffered by the parties should the amendments be allowed. I take note that this matter was filed in 2013 and the Plaintiff has been amended twice before. In these circumstances, it is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application 17th May 2023 dated is merited and is allowed as prayed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

